Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1345

JAMES G. RYAN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statute Involved	2
Statement	3
Reasons for Granting the Writ	8
Conclusion	15
Appendix A	1a
Appendix B	4a
Appendix C	5a
Appendix D	7a

CITATIONS

Cases:

Alderman v. United States, 394 U.S. 165	10
Brinkley v. United States, 498 F.2d 505	10
Dennis v. United States, 384 U.S. 855	11
Marshall v. United States, 420 F.2d 1315	13
United States v. Bass, 477 F.2d 723	11, 13
United States v. Durant, 545 F.2d 823	13
United States v. Jonas, 540 F.2d 566	13
United States v. Johnson, 238 F.2d 565	14
United States v. Mundt, 508 F.2d 904	10, 12
United States v. Nobles, 422 U.S. 225	8, 9, 11
United States v. Schultz, 431 F.2d 907	10
United States v. Sutton, 464 F.2d 552	12
United States v. Theriault, 440 F.2d 713	10, 11, 12
Wardius v. Oregon, 412 U.S. 470	14

Page

STATUTES AND REGULATIONS:

18 U.S.C. § 1341 3

18 U.S.C. § 2314 3

Criminal Justice Act (18 U.S.C. § 3006A) 2, 5, 8

Speedy Trial Act (18 U.S.C. § 3161) 9, 15

28 U.S.C. § 1254(1) 2

MISCELLANEOUS:

Annual Report of the Director of the Administrative Office the United States Courts, in Reports of the Proceedings of the Judicial Conference of the United States (1977) 8

D. Oaks, The Criminal Justice Act in the Federal District Courts 9

Report of the Committee to Implement the Criminal Justice Act of 1964, 36 F.R.D. 285 8

Note, Right to Aid in Addition to Counsel for Indigent Defendants, 47 Minn. L. Rev. 1054 14

Krantz, Smith, Rossman, Floyd & Hoffman, *Right to Counsel in Criminal Cases* (1976) 14

ABA, Standards Relating to Providing Defense Services § 1.5 and Commentary 12

S. Rep. No. 346, 88th Cong., 1st Sess. 8, 14

H.R. Rep. No. 1709, 88th Cong., 2d Sess. 13

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, *infra,* pp. 1a-3a) is not reported. The March 25, 1978, opinion of the district court is reprinted at Pet. App. B, *infra,* p. 4a.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1978 (Pet. App. A, *infra,* pp. 1a-3a). On January 9, 1979, the court of appeals denied a timely petition for rehearing with a suggestion for rehearing *en banc* (Pet. App. C, pp. 5a-6a). On January 30,

1979, Mr. Justice Marshall extended the time within which to petition for a writ of certiorari to March 1, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether, under the Criminal Justice Act (18 U.S.C. § 3006A(e)(1)), a defendant is entitled to investigative services when his appointed counsel makes a timely request in circumstances in which a reasonable attorney would engage such services for a client having the financial means to pay for them, as the courts of appeals for the Eighth and Ninth Circuits have held, or whether appointed defense counsel must demonstrate, in a non-*ex parte* proceeding, what specifically the investigator would find and make a strong showing of necessity regarding why appointed counsel should not do the investigation himself, as the courts below held.

STATUTE INVOLVED

Section 3006A(e) of the Criminal Justice Act, 18 U.S.C. § 3006A(e), provides:

> (e) Services other than counsel.—
>
> (1) *Upon request.*—Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.

> (2) *Without prior request.*—Counsel appointed under this section may obtain, subject to later review, investigative, expert, or other services without prior authorization if necessary for an adequate defense. The total cost of services obtained without prior authorization may not exceed $150 and expenses reasonably incurred.
>
> (3) *Maximum amounts.*—Compensation to be paid to a person for services rendered by him to a person under this subsection, or to be paid to an organization for services rendered by an employee thereof, shall not exceed $300, exclusive of reimbursement for expenses reasonably incurred, unless payment in excess of that limit is certified by the court, or by the United States magistrate if the services were rendered in connection with a case disposed of entirely before him, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit.

STATEMENT

On April 26, 1978, after a jury trial in the Southern District of New York, petitioner was found guilty of nine counts of mail fraud (18 U.S.C. § 1341) and three counts of inducing persons to travel in interstate commerce in furtherance of a scheme to defraud (18 U.S.C. § 2314). He was sentenced to concurrent terms of 30 months' imprisonment on the mail fraud counts, with imposition of sentence on the remaining counts suspended; the court further ordered petitioner placed on probation for five years after expiration of his incarceration.

The twelve-count Indictment in this case was filed in the Southern District of New York on December 29,

1977, the case having been ordered transferred from the Western District of Washington on December 22, 1977, pursuant to petitioner's motion for a change of venue. The Indictment charged that from March 1974 through 1977, petitioner, doing business as Ryan Consulting, Gmbh, defrauded certain individuals and companies who were interested in constructing pre-fabricated housing in African and Middle Eastern nations, including Saudi Arabia, Egypt, Sudan and Nigeria (App. 6a-8a).[1]

The Indictment further charged that, as part of the scheme to defraud, petitioner induced contractors to travel from various locations in the United States to petitioner's home in Konigstein, West Germany; that petitioner received $30,000 performance bonds from the contractors, which he converted to his own use although he had promised to return the funds upon each contractor's completion of 300 housing units; and that petitioner falsely represented that Ryan Consulting had contracts with foreign governments and export credit lines for the construction of prefabricated housing (App. 6a-8a).

At a pretrial conference on January 23, 1978, the district court set a trial date of April 17, 1978, and directed that pretrial motions be filed by February 6, 1978.[2] The court was informed during the pretrial

[1] "App." refers to the Appendix filed in the court of appeals.

[2] When petitioner failed to appear at his arraignment on January 12, 1978, the court issued a bench warrant for his arrest, which the court stayed until January 23, 1978, the date set by the court for a pre-trial conference. On January 23, 1978, petitioner did not appear, but John C. Leonard, Esq., an attorney friend of the family, informed the court that petitioner was abroad on business and was also attempting to gather documents for his defense (Jan. Tr. 16). (Petitioner's bond conditions allowed him to travel overseas upon giving one days' notice; petitioner had notified the Pretrial Services Division in the Southern District of New York of his trip abroad (*id.* at 14.).) Mr. Leonard, a civil lawyer, was not retained by petitioner and refused to enter an appearance (*id.* at 4, 6, 19).)

conference that petitioner had run out of funds and that it might be necessary for him to have appointed counsel.[3]

On February 6, 1978, the court found that petitioner was indigent and assigned counsel to him pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A, but refused petitioner's request to extend the trial date.[4] In view of the complexity of the case, petitioner's assigned counsel moved for the appointment of another attorney to aid in the defense; the court, on February 24, 1978, granted petitioner's motion over the government's objection.

One week later, on March 1, 1978, petitioner's appointed counsel requested that the defense be authorized to obtain the services of an investigator under the Criminal Justice Act, 18 U.S.C. § 3006A(e)(1), to assist in the preparation for trial, which was then a month and a half away.[5] Defense counsel pointed out his accompanying affidavit that the case was very complex, involving the availability of export credits and the development of housing projects in the Middle East and Africa; that the prosecution had indicated it would present evidence concerning business dealings in France,

[3] *Id.* at 19-20.

[4] The court also extended the date for the filing of pretrial motions to February 27, 1978.

[5] App. 31a.

Germany, Switzerland, Saudi Arabia, Egypt, Nigeria and other nations; that the government, over a two-year period, had utilized its investigative resources to question witnesses and gather documents in those foreign countries, as well as in a number of cities in the United States; and that defendant, because of bail conditions, was not free to contact government witnesses or companies named in the Indictment.[6]

Defense counsel further stated in the affidavit that the government had turned over voluminous documents in discovery; that the time of defense counsel was consumed by the immense amount of work needed to digest these documents, analyze the complicated transactions in the case, research the law and otherwise prepare the case for trial; and that in order to present an adequate defense, it was necessary to have an investigator "who could travel, interview witnesses, review and locate other documents, and otherwise substantiate the defense position that no criminal fraud was commited by the defendant."[7]

The district court did not rule on petitioner's request for an investigator until three weeks later, on March 25, 1978,[8] at which time the court denied the request on the basis that petitioner had "not made an adequate showing of the need for an investigator" and that

[6] Pet. App. D, *infra*, pp. 7a-14a.

[7] *Id.* at pp. 7a-9a; 10a-13a.

[8] Although Section 3006A(e) provides that requests for investigative services be heard by the court *ex parte*, the government filed an opposition to petitioner's motion, arguing that petitioner had not made a specific enough showing of why he needed an investigator.

"[t]here is no reason why the necessary trial preparation cannot be achieved by counsel."[9]

The trial began on April 17, 1978, with the government represented by two of its attorneys and one of the government's investigators assigned to the case (a Postal Inspector), who sat at counsel table and assisted the prosecution.[10] During the trial, the government introduced seventy exhibits and called twenty-four witnesses. The witnesses, who were from Arizona, California, Washington, and New York and the countries of South Africa, England and Nigeria, testified about meetings and contracts in various places in the United States and in West Germany, South Africa, Nigeria, France, Italy, Egypt and Sudan, involving not only American contractors but also high foreign government officials and leaders.[11] The defense called no witnesses and, as stated above, the jury returned a verdict of guilty on all counts.

The court of appeals affirmed, holding in part that the district court had not abused its discretion in denying petitioner's request for an investigator because petitioner had failed "to set forth the reasons for the need of an investigator's services and its relevance to an adequate defense" and had failed to demonstrate

[9] Pet. App. B., *infra*, at p. 4a. At the same time, the court refused to extend the trial date and denied petitioner's request to travel in order to aid in the preparation of his defense. *Ibid.*

[10] Tr. 3. As one of its witnesses at trial the government called another Postal Inspector to testify regarding petitioner's bank accounts. Tr. 1220.

[11] Moreover, one month prior to trial, the court granted the government's motion to take the depositions of two bank officials in Switzerland and use this evidence at trial (see Rule 15, Fed. Rules Crim. Pro.).

why his attorneys "could not undertake the tasks to which the investigator was to be assigned" (Pet. App. A, *infra*, at p. 2a).

REASONS FOR GRANTING THE WRIT

One of "the realities of litigation in our adversary system . . . is that attorneys must often rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial." *United States* v. *Nobles*, 422 U.S. 225, 238 (1975). Appointed counsel representing indigent defendants need investigatory services as much as, if not more than, retained attorneys. In passing the Criminal Justice Act of 1964, 18 U.S.C. § 3006A, Congress agreed that "an adequate defense also requires the availability of fact-finding services to assist counsel in his preparation of the case. The importance of skilled investigation . . . is underscored in police work every day. The prosecuting attorney cannot function without the facts. It is no less true for the defense." [12] Despite Congress' provision of investigative services for indigent defendants, many courts have apparently followed the suggestion of a committee of the Judicial Conference [13] that approval of such services should be strictly limited.[14] In fiscal year 1977, only one-half of one percent of the total amount spent on defender services was devoted to investigative services; [15] during the same period, although

[12] S. Rep. No. 346, 88th Cong., 1st Sess. 3 (1963).

[13] *Report of the Committee to Implement the Criminal Justice Act of 1964*, 36 F.R.D. 285, 290 (1965).

[14] But see note 17 *infra*.

[15] *Annual Report of the Director of the Administrative Office the United States Courts*, in Reports of the Proceedings of the Judicial Conference of the United States 533, 537 (1977).

46,500 persons were represented pursuant to the Criminal Justice Act, the courts approved but 19 claims for investigative services above the $300 limit of Section 3006A(e)(3).[16]

The problem is serious [17] and the "undesirable lack of uniformity from district to district" in approving requests under Section 3006A(e)(1) to use investigators,[18] spawned by decisions such as those made in this case, demonstrates why this is an area that has been "ripe for further guidance" [19] for quite some time. The issue presented in this case has become all the more critical as the pressures exerted by the Speedy Trial Act, 18 U.S.C. § 3161, force defense counsel (especially in complex cases) to rely on investigators for many of the necessary but time-consuming tasks before trial, such as interviewing government and potential defense witnesses.[20]

The court of appeals and the district court in this case, however, ignored these "realities of litigation" [21] and rejected the request of petitioner's counsel for an investigator, holding that defense counsel could undertake the task of interviewing witnesses and gathering documents and that petitioner had not met the stand-

[16] *Id.* at 578-580; 536.

[17] See D. Oaks, *The Criminal Justice Act in the Federal District Courts* VIII-35 (1967 mimeograph) ("It is ironic that courts have had more difficulty approving requests for investigators, who are specifically mentioned in the language of the Act, than they have had in authorizing payment for some of the exotic types of defense services . . . . However ironic, the problem is serious.").

[18] *Id.* at VIII-38.

[19] Id. at VIII-37.

[20] See 65 *ABA Journal* 23 (Jan. 1979).

[21] *United States* v. *Nobles*, *supra*, 422 U.S. at 238.

ards of *United States* v. *Mundt*, 508 F.2d 904, 908 (10th Cir. 1974), *cert. denied*, 421 U.S. 949 (1975), which required a "strong showing as to necessity" and a statement regarding what the investigator "expected specifically to find." Those, however, are not the tests Congress intended and other courts of appeals do not adhere to such stringent standards.

As Judge Wisdom has pointed out, "Congress chose an expenditure limit [of $300, plus expenses] rather than requiring defendants to demonstrate unusual need for defense services." *United States* v. *Theriault*, 440 F.2d 713, 717 (5th Cir. 1971) (Wisdom, J., concurring), *cert. denied*, 411 U.S. 984 (1973):[22]

> The trial judge should tend to rely on the judgment of the attorney, who has the primary duty of providing an adequate defense. Such reliance is recommended by the difficulty of requiring the trial judge to take an adversary view of the case. *Alderman* v. *United States*, 1969, 394 U.S. 165, 182 . . . . Additionally it avoids forcing the defendant to reveal private information to the Court in order to support the request for such services. Further it comes close to putting the indigent defendant in the same position as a non-indigent defendant, where the defense attorney would determine whether to engage the services.

Judge Wisdom's reasoning has been adopted by the Eighth Circuit in *Brinkley* v. *United States*, 498 F.2d 505, 510 (8th Cir. 1974);[23] and by the Ninth Circuit

[22] In relying upon *Mundt* v. *United States*, *supra*, both courts below failed to recognize that *Mundt* was a case—unlike this one—in which the defense counsel sought authorization for investigative services beyond the expenditure limit in Section 3006A(e)(3).

[23] See also *United States* v. *Schultz*, 431 F.2d 907, 911 (8th Cir. 1970).

in *United States* v. *Bass*, 477 F.2d 723, 725 (9th Cir. 1973). Had it been followed here, petitioner's request for an investigator would have been approved.

Contrary to the decisions below, the fact that an appointed defense attorney has the ability to interview witnesses and generally conduct an investigation himself is not a reason for denying investigative services; if it were, such services would never be made available under the Criminal Justice Act. When, as here, appointed counsel states (under oath) that the nature of the case and the short period of time before trial necessitates the use of an investigator, the court "should rely on the judgment of the attorney, who has the primary duty of providing an adequate defense."[24] As this Court stated in *Dennis* v. *United States*, 384 U.S. 855, 875 (1965), "[i]n our adversary system it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate."

Further, the American Bar Association, in recommending that investigatory services be made available to indigent defendants, has recognized what all experienced defense counsel know: "If the attorney must personally conduct the investigation the cost to the system is likely to be greater. Moreover, if the attorney must always personally interview witnesses he may be placed in the untenable position of either taking the stand to challenge their credibility if their testimony conflicts with statements earlier given to him or withdrawing from the case to avoid embarrassment."[25]

[24] *United States* v. *Theriault*, *supra*. 440 F.2d at 717 (Wisdom, J., concurring).

[25] See *United States* v. *Nobles*, supra, 422 U.S. at 227-229, in which the defense called its investigator to impeach the credibility

ABA Project on Standards for Criminal Justice, *Standards Relating to Providing Defense Services* § 1.5 and Commentary (Approved Draft 1968).

The other apparent ground for the decision below—that under *Mundt* v. *United States, supra,* petitioner's counsel was required to point out what specifically the investigator would uncover—is inconsistent with Judge Wisdom's reasoning that the defendant should not be required "to reveal private information to the Court in order to support the request for such services." *United States* v. *Theriault, supra,* 440 F.2d at 717. In reaching this conclusion Judge Wisdom pointed to Congress' direction in Section 3006A(e)(1) that the request for investigative services should be decided by the court in an *ex parte* proceeding.

In this case, however, the Section 3006A(e) proceedings were not conducted *ex parte* and the prosecution took the extraordinary step of filing a written opposition, citing *United States* v. *Mundt, supra,* and arguing that petitioner's request should be more specific about what the investigator would be used to discover.[26] At least two courts of appeals have held that the failure to conduct Section 3006A(e)(1) proceedings *ex parte,* as the statute directs, requires reversal of the conviction when the services requested have been refused. *United States* v. *Sutton,* 464 F.2d 552 (5th Cir. 1972).

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of two prosecution witnesses the investigator had interviewed. (The investigator was employed by the Federal Public Defenders (501 F.2d 146, 151 (9th Cir. 1974)) who represented Nobles. See 18 U.S.C. 3006A(h)(2)(A).)

[26] Government Omnibus Memorandum offered in Response to Pretrial Motions by Defendant James G. Ryan 19.

Marshall v. *United States,* 420 F.2d 1315, 1318 (10th Cir. 1970).[27]

In light of the facts of this case, with its complicated series of events and with government witnesses scattered throughout the United States and abroad, there is no doubt that in the short period of time before trial a retained attorney representing a client with financial resources would have utilized an investigator. Under a proper interpretation of Section 3006A(e)(1), such services should be authorized for an indigent defendant whenever "the defense makes a timely request in circumstances in which a reasonable attorney would engage such services for a client having the independent financial means to pay for them." *United States* v. *Bass, supra,* 477 F.2d at 725; *cf. United States* v. *Jonas,* 540 F.2d 566, 569 n.3 (7th Cir. 1976). Only then can an indigent defendant have resources available approaching those of defendants with retained counsel,[28] as Congress intended.[29]

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[27] In an earlier opinion (*United States* v. *Durant,* 545 F.2d 823 (2d Cir. 1976)), which the court below did not cite, the Second Circuit moved toward adoption of Judge Wisdom's standard articulated in *United States* v. *Theriault, supra,* although it did expressly state that it would follow that standard in the future. 545 F.2d at 827. The decision below indicates the Second Circuit will instead follow the formulation in *Mundt* v. *United States, supra.* See note 22 *supra.*

However, the court, in *Durant* did recognize that when (as in this case) the trial judge fails to conduct Section 3006A(e) proceedings *ex parte,* defense counsel "cannot be held accountable" for failing to be more specific in his request for services. 545 F.2d at 828 n.9.

[28] Congress intended that services under Section 3006A(e) be made available even to those who had retained attorneys. See H. R. Rep. No. 1709, 88th Cong., 2d Sess. 6 (1964) (Conference Report); Oaks, *supra,* at VIII-23.

[29] Indeed, it has been argued that providing such services is necessary to meet the Sixth Amendment's guarantee of effective

Moreover, Congress enacted Section 3006A(e) in order to put indigent defendants on a footing closer to that of prosecutors, who have the resources of the government at their command. The Department of Justice, candidly recognizing its advantage over indigent defendants, urged passage of Section 3006A(e) for those reasons.[30]

Over the years, the government's "inherent information-gathering advantages"[31] have sharply increased. While the prosecution, by delaying the grand jury's return of the indictment, may grant itself sufficient time for thorough pretrial preparation, the Speedy Trial

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assistance of counsel. See, *e.g.*, Krantz, Smith, Rossman, Floyd & Hoffman, *Right to Counsel in Criminal Cases* 182-184 (1976); Note, *Right to Aid in Addition to Counsel for Indigent Defendants*, 47 Minn.L.Rev. 1054 (1963); *United States* v. *Johnson*, 238 F.2d 565, 572 (2d Cir. 1956) (Frank, J., dissenting).

[30] Attorney General Robert F. Kennedy pointed out in his statement to the Senate Judiciary Committee, made part of the Committee report, that:

> Providing for experienced, paid counsel is fundamental. But the phrase "adequate defense" means more than counsel. Equally important to a defense are defense services. For example, the poor man cannot hire an investigator to find the witnesses and evidence which may be indispensable to his case. He cannot retain a physician, psychiatrist, or handwriting expert. The importance of skilled investigation is underscored in police work every day. It works the same way for the defense.
>
> Not long ago, here in the District, an appointed defense attorney—through the investigative facilities of the Legal Aid Agency—was able to expose facts damaging to the Government's principal witnesses. These were facts the Government previously did not know and the case, as a result, was dismissed.

S. Rep. No. 346, 88th Cong., 1st Sess. 8 (1963).

[31] *Wardius* v. *Oregon*, 412 U.S. 470, 475 n.9 (1973).

Act (18 U.S.C. § 3161) rushes the defendant to trial a relatively short period after arraignment. Moreover, even though the government confers upon itself adequate time to prepare, it is a rare case when the prosecution does not use government investigators to gather evidence and interview witnesses for trial. Indeed, in this case the two prosecutors, although opposing petitioner's modest request for an investigator, utilized the investigative resources of the government to develop their case, called a Postal Inspector to testify and found it necessary to have another Postal Inspector assist them by sitting at counsel table during the entire trial.

A defendant with sufficient resources may be able to overcome the government's advantage; an indigent defendant cannot, unless he is provided the investigatory services he is entitled to under 18 U.S.C. § 3006(e)(1). That is why Congress enacted the Criminal Justice Act and that is why the decision below warrants review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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Attorney for Petitioner.

March 1979.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of December, one thousand nine hundred and seventy-eight.

Present:

HONORABLE IRVING R. KAUFMAN, *Chief Judge.*

HONORABLE J. JOSEPH SMITH,

HONORABLE ELLSWORTH VAN GRAAFEILAND, *Circuit Judges.*

78-1299

UNITED STATES OF AMERICA, *Appellee,*

v.

JAMES G. RYAN, *Defendant-Appellant.*

Filed December 5, 1978

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

1. Since the defendant stated in general terms and without specificity the nature of the prejudice he suffered from the denial of his motion for a continuance, *United States* v. *Rastelli,* 551 F.2d 902, 906

(2d Cir. 1977), and because his attorney assured the trial judge that he would not ask for a postponement of the trial date, *see United States* v. *Lewis,* 565 F.2d 1248, 1253 (2d Cir. 1977), we cannot say that Judge Metzner abused his discretion in denying the motion.

2. In light of the defendant's failure to set forth the the reasons for the need of an investigator's services and its relevance to an adequate defense, *see United States* v. *Mundt,* 508 F.2d 904, 908 (10th Cir. 1974), *cert. denied,* 421 U.S. 949 (1975), and in the absence of a showing that his attorneys could not undertake the tasks to which the investigator was to be assigned, *see United States* v. *Harris,* 542 F.2d 1283, 1316 (7th Cir. 1976), *cert. denied,* 430 U.S. 934 (1977), Judge Metzner properly exercised his discretion in refusing to appoint such an investigator under the Criminal Justice Act, 18 U.S.C. § 3006A(e)(1).

3. Judge Metzner did not abuse his broad discretion in refusing to direct issuance of an indigent subpoena under Fed. R. Crim. P. 17(b), because defendant's offer of proof did not establish that the witness's testimony would be necessary or relevant to his case, *see United States* v. *Hegwood,* 526 F.2d 946, 952 (5th Cir. 1977), *cert. denied,* 434 U.S. 1079 (1978).

4. Judge Metzner properly concluded that the travel restrictions imposed on the defendant were reasonsonably necessary to assure that he would appear at trial, *see United States* v. *Cook,* 428 F.2d 461 (5th Cir. 1970), and that his presence at the deposition of the custodian of the Swiss bank records was not required by the confrontation clause of the

Sixth Amendment, *see United States* v. *Bell,* 464 F.2d 667, 672 (2d Cir. 1972).

/s/ IRVING R. KAUFMAN
Irving R. Kaufman, Chief Judge.

/s/ J. JOSEPH SMITH
J. Joseph Smith

/s/ ELLSWORTH VAN GRAAFEILAND,
Ellsworth Van Graafeiland,
Circuit Judges.

A true copy,
C. Daniel Fusan
by A. Heller, Deputy Clerk

APPENDIX B

UNITED STATES v. JAMES G. RYAN

77 Cr. 915 (CMM)

Defendant moves for the appointment of an investigator pursuant to the Criminal Justice Act, for postponement of the trial date, and for permission for the defendant to travel abroad before the trial.

Defendant has not made an adequate showing of the necessity for an investigator. The court has already approved the appointment of two trial counsel for the defendant pursuant to the Criminal Justice Act. There is no reason why the necessary trial preparation cannot be achieved by counsel. *United States* v. *Mundt*, 508 F.2d 904, 908 (10th Cir. 1974), *cert. denied*, 421 U.S. 949 (1975).

I have already stated my position numerous times on the record regarding defendant's requests for an adjournment of the trial and for permission to travel. Defendant originally pled not guilty in the Western District of Washington on November 29, 1977. The case was transferred on defendant's motion to this court on December 29, 1977. The trial date of April 17, 1978 was set on January 23, 1978. Four and a half months is ample time within which to prepare for trial. Defendant was abroad for a month in January gathering evidence for the trial.

Both requests are denied.

So ordered.

Dated: New York, N.Y.
March 25, 1978

/s/ CHARLES M. METZNER
U. S. D. J.

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of January, one thousand nine hundred and seventy-nine.

Present: HONORABLE IRVING R. KAUFMAN
HONORABLE ELLSWORTH VANGRAAFEILAND
HONORABLE J. JOSEPH SMITH, *Circuit Judges.*

78-1299

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

JAMES G. RYAN, *Defendant-Appellant.*

A petition for a rehearing having been filed herein by counsel for the Appellant

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO,
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of January, one thousand nine hundred and seventy-nine.

78-1299

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

JAMES G. RYAN, *Defendant-Appellant.*

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellant, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN
Irving R. Kaufman,
Chief Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

77 Cr. 915 (CMM)

UNITED STATES OF AMERICA, *Plaintiff*

—against—

JAMES G. RYAN, *Defendant*

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:
SOUTHERN DISTRICT OF NEW YORK)

Affidavit of Counsel in Support of Motion

RALPH S. NADEN, being duly sworn, deposes says:

1. I am an attorney for the defendant herein, having been appointed pursuant to the Criminal Justice Act on February 24, 1978.

2. Other counsel was also appointed in this case on February 6, 1978, and both attorneys are presently working on the matter.

3. This motion is for the appointment of an investigator pursuant to the Criminal Justice Act, for an extension of time for trial preparation, for permission for the defendant to travel abroad, and for such other relief as may seem proper under the circumstances.

Appointment of Investigator

4. This matter involves a complex series of facts relating to business activities that the government claims are or were fraudulent at the outset, notwithstanding substantial material in the government's own files indicating that the defendant (1) had export credits and (2) assisted in the

development of housing projects in the Middle East and in Africa.

5. Such documents as were turned over to the defense by the government as voluntary compliance with Rule 16, Federal Rules of Criminal Procedure, reveal a far-flung business enterprise, with contacts in several countries, including France, Germany, Switzerland, Saudi Arabia, Egypt, Nigeria, and other nations.

6. The gravamen of the allegation is that the defendant defrauded American businessmen regarding construction projects in other countries.

7. It thus becomes readily apparent that preparation of this defense requires an immense amount of work, both on the law pertinent to the issues and on the facts of the case, in order to comply with time deadlines set by the Court. The matter is presently scheduled for trial on April 17, 1978.

Particularized Need for Investigative Assistance

8. Annexed hereto as *Exhibit A* executed by the Honorable Philip K. Sweigert, United States Magistrate for the Western District of Washington, from whence this indictment emanated, setting forth various bail conditions regulating the travels and behavior of the defendant upon his release on bail from that District, Judge Sweigert ordered the defendant "not to personally contact any person named in the indictment . . . ."

9. It being the defense position that the business activities in question here constituted a legitimate course of dealings, and that contractors did perform construction pursuant to the herein-alleged course of dealings, that to prevent the defendant from contacting those individuals with whom he had successful dealings would be violative of his Fifth and Sixth Amendment Rights under the Constitution of the United States, would prevent him from the effective preparation of a defense herein, would inhibit the ability

of defense attorneys to adequately prepare for trial, and would effectively cripple defendant's rights under the Fifth Amendment of the Constitution to Due Process of Law, in that Court process would thus inhibit his ability to adequately prepare for trial or to consult with and prepare counsel for trial.

10. Work must be done of a preparatory and investigative nature in affording defendant an adequate opportunity to prepare for trial and to confront witnesses called by the Government at a trial of the issues. This work, in part, can be accomplished by an authorized investigator, working with the defense, who could travel, interview witnesses, review and locate other documents, and otherwise substantiate the defense position that no criminal fraud was committed by the defendant.

11. It should be noted that the investigation culminating in this indictment lasted for a period of approximately two years and that government investigators, upon information and belief, travelled in several countries, secured documents in other countries,[1] and had extensive contacts with persons who were acquainted with the defendant. In a separate motion, defendant argues that the widespread investigation of his activities resulted in the accumulation by the government of extensive exculpatory material which was improperly withheld from the Grand Jury.

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[1] See defendant's motion to dismiss pursuant to Rule 12(b)(1) on grounds of defects in the institution of the prosecution. Countries mentioned include Germany, France, Italy, Saudi Arabia, Egypt, Nigeria and others. Included is Mexico, where upon information and belief, a Secret Service agent named Driscoll approached a business associate of the defendant, questioned him about his relationship with defendant, read off a lengthy list of telephone numbers, and told this person that Mr. Ryan was a criminal, that the Government was going to get him, and that Ryan's associate should avoid the defendant because of the trouble he was in. This visit occurred in July, 1977, upon information and belief, a date pre-dating the filing of the instant indictment.

12. In order to comply with Judge Sweigert's order preventing him from initiating contact with persons named in the indictment, defendant requires—in the interest of Due Process and Sixth Amendment Rights—some facility for investigating the allegations made against him by the government, and hereby requests the appointment of investigative assistance to aid in the preparation of the defense case.

13. The government served upon defense counsel a notice for reciprocal discovery pursuant to Rule 16(b), and upon information and belief, intends to press that discovery issue in this litigation. Rule 16(b)(1)(A) provides that defendant must furnish to the government such documents which, among other tests to be applied, defendant "intends to introduce as evidence in chief at the trial".

14. While it is obvious at this juncture that any such determination is highly premature, considering the voluminous nature of material furnished defendant by the Government, and considering the complicated factual pattern presented here, the services of an investigator would be essential to locating other documents and locating witnesses who would be helpful to the defense case and which would help the defense determine the fashion in which reciprocal discovery might be effectuated, if that can be done.

Extension of Time for Trial Preparation

15. Upon information and belief, the Court has set a firm trial date of April 17, 1978, as the date when trial is to commence. Considering the far-flung nature of the enterprise alleged here, and considering the fact that witnesses reside in distant states and in many foreign countries, such an early date for trial would effectively emasculate defense efforts to make a fair presentation at trial. Witnesses are required, especially from foreign countries, and the necessity (1) to investigate and determine which witnesses corroborate the defense position, (2) give such witnesses, who

compromise Government officials, business people, and financial people, adequate time to arrange their affairs in order to make the long trip to New York to testify, and (3) to substantiate defendant's contention that the within enterprise was a legitimate one, and not one of a fraudulent nature; the defense therefore requires an extension of time for preparation for trial. Anything less would result in a denial of due process, since it is submitted that it would be little short of impossible to secure the presence of witnesses for the defense from so many foreign countries.

16. Defendant informs me that he is willing to waive the requirements of the speedy trial rules, 18 U.S.C.

REQUIREMENTS FOR DEFENDANT TO TRAVEL ABROAD

17. It is respectfully requested that the Court grant the defendant leave for international travel during the pendency of this litigation. There are several essential reasons for this request.[2]

a. Preparation of Defense

18. Travel by the defendant is essential to adequate preparation of this case. Witnesses in various European countries, in various nations of the Middle East, and in Africa, are in a position to sustain the defendant's position that the plan, as alleged in the indictment, was not a fraudulent scheme, but was part of an ongoing, legitimate business transaction. These witnesses must be contacted by the de-

[2] AFFIANT is cognizant of a telephone request made by co-counsel Mr. McKay, made on Friday, February 24, 1978, for travel to be made by the defendant, since that was the date of Affiant's assignment to the matter. It is conceded, as of this moment, and on grounds of the necessity of having the defendant available to sign affidavits and prepare counsel for the submission of motions, that the Court's decision was not unreasonable on February 24. This motion, however, raises other grounds and defendant wishes to make a presentation of exculpatory material at the earliest possible time.

fendant. Counsel is unable to travel, and it is respectfully requested that because of the important positions held by potential defense witnesses, that an investigator would be unable to secure some of the required information—even if the Court were willing to authorize payment for the services of an investigator to travel abroad pursuant to Criminal Justice Act payment limitations. Thus, preventing defendant from traveling abroad to (1) secure documents, (2) locate and invite witnesses to come and testify at the trial herein, and (3) in general prepare for trial, works against his Fifth and Sixth Amendment rights to Due Process of Law and the *effective* assistance of counsel, insofar as counsel's role is hindered by the limitation of not being able to consult, investigate, and invite witnesses to testify.

19. Defendant states that exculpatory documents are present in Germany, Switzerland, in Middle Eastern and African countries, and are available only to him. They are exculpatory in that they will prove the defense contention [3] that defendant's role in the instant alleged offense was part of a business transaction. Defendant's travel is required especially to contact European banking officials who would otherwise be bound by bank secrecy laws; [(Exhibit B) one bank document underscoring defense contention of innocence].

20. It is counsel's assessment of the defendant's position, based upon conversations with him, that such documents would form an essential link in the proof to be offered by the defendant, and that denial of the opportunity to locate and produce such documents would cripple defendant's Fifth and Sixth Amendment rights.

[3] It is the defense position at this point that material already furnished by the government pursuant to Rule 16 exculpates the defendant, and that argument is furnished in defendant's Rule 12 motion to dismiss the indictment because of defects in the institution of the prosecution. Some of those exculpatory documents were annexed to that motion; others will be furnished the Court as counsel examines them. These voluminous documents furnished by the government form a pile some eight inches in height.

21. In view of the government's request pursuant to Rule 16(B), for the defense to furnish relevant documents, defendant must have adequate opportunity to show such documents as would negate the inferences raised in the charges made against him.

DEFENDANT'S BUSINESS NEEDS

22. Defendant must also travel in order to support himself, his wife, and children. International travel is an essential tool of his business, which is widespread in nature. To prevent the defendant from travelling results in his pauperization, makes him unable to afford the kind of investigation a case of this scope calls for, and poses severe hardship on himself and his family.

23. It is respectfully submitted that the defendant has had his opportunity not to appear and chose to appear in Court to answer the charges against him. He has not fled, nor avoided process in this case. On one prior occasion, in late January, 1978, the defendant was abroad and returned again to the United States, when counsel was appointed on February 6, 1978.

24. The government had no objection to defendant's latest request to travel on February 24th.

25. It is respectfully requested that the Court take into consideration Judge Sweigert's condition on bail that defendant be permitted to make international travel on "notice of one business day to the United States Attorney's office . . . ." [4]

[4] In no sense is it contended that this Court is bound by Judge Sweigert's position, but merely commend it as one factor to consider among the rest of the issues raised in this and other motions.

26. To prevent the defendant from working at his business under the usual conditions would seem contrary to the presumption of innocence that attaches in all criminal proceedings, especially one like this where defendant alleges that substantial exculpatory material already found itself—possibly by unlawful means—into the government's hands. Such a position would seem violative of defendant's Fifth Amendment Rights.

27. At the time bail was originally set, and Judge Sweigert's conditions imposed, defendant's release was conditioned on his posting as bond his apartment in New York and his house in Connecticut.

28. Accordingly, defendant renews his request that the Court permit international travel, and requests an opportunity to make an oral presentation at the earliest possible date on this issue.

WHEREFORE, it is respectfully requested that the Court grant the relief herein requested, and such other and further relief as may seem just and proper under the circumstances.

/s/ RALPH S. NADEN

Sworn to before me this 1st day of March, 1978.

Supreme Court, U. S.
FILED
MAY 9 1979
MICHAEL RODAK, JR., CLERK

No. 78-1345

In the Supreme Court of the United States

OCTOBER TERM, 1978

JAMES G. RYAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

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Department of Justice
Washington, D.C. 20530

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1a-3a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1978. A petition for rehearing was denied on January 9, 1979. Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to March 1, 1979, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court erred in denying petitioner's pre-trial request for the appointment of an investigator under the Criminal Justice Act of 1964, 18 U.S.C. 3006A(e)(1).

STATUTE INVOLVED

18 U.S.C. 3006A(e)(1) provides:

> Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request them in an *ex parte* application. Upon finding, after appropriate inquiry in an *ex parte* proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on nine counts of mail fraud, in violation of 18 U.S.C. 1341, and on three counts of inducing persons to travel in interstate commerce in furtherance of a scheme to defraud, in violation of 18 U.S.C. 2314. Petitioner was sentenced to 30 months' imprisonment and five years' probation. The court of appeals affirmed (Pet. App. 1a-3a).

1. The evidence at trial, the sufficiency of which petitioner does not challenge, showed that petitioner and an agent whom he had recruited obtained cash performance bonds from construction contractors in the United States by falsely representing that they had entered into contracts for the erection of pre-fabricated housing with various South African building manufacturers and the governments of Egypt, Sudan, Nigeria and Saudi Arabia, and that such bonds were required by the contracts. By means of these representations,

petitioner obtained approximately $235,000 in cash, which he converted to his personal use. More than $150,000 was deposited in accounts in petitioner's name at a bank in Zurich, Switzerland. None of this money went to the foreign governments with which petitioner purported to have contracted. Petitioner presented no evidence in his defense.

2. Petitioner was indicted on November 8, 1977, in the United States District Court for the Western District of Washington. Through retained counsel in Washington, petitioner moved for a change of venue to the Southern District of New York on the ground, *inter alia*, that for medical reasons it was undesirable for him to be absent from the New York area, where his doctor was located, for more than a week at a time. The motion was granted and the case was transferred to the Southern District of New York on December 22, 1977.

On January 12, 1978, petitioner failed to appear for his scheduled arraignment in New York, and the court issued a bench warrant for his arrest, but stayed its execution until January 23, 1978. On January 23 petitioner again failed to appear in court, and John Leonard, an attorney who purported to enter a "special appearance" on petitioner's behalf, asked the court to stay execution of the warrant. Leonard informed the court that he had been asked to appear by petitioner's wife, that he had been in telephone communication with petitioner for the past week, that petitioner was in Europe gathering evidence for his defense and that petitioner would be back in the country by February 6 and would seek no further continuance from the court (January 23, 1978 Tr. 2, 4, 6-7, 14-20). When the court noted that petitioner's

absence from the country was in violation of bail conditions imposed on petitioner (*id.* at 15-17), counsel stated that petitioner was aware of the April 17 trial date and would not ask for a postponement (*id.* at 17).

On February 6, petitioner appeared in court, and, over the government's objection that petitioner could afford retained counsel, the court appointed an attorney to represent him. On February 24, 1978, at petitioner's request and again over the government's objection, the court appointed a second attorney to represent him at public expense.

On March 1, 1978, contrary to counsel's earlier representation that petitioner would not seek to postpone the scheduled trial date, petitioner moved for a continuance of the trial, permission to travel abroad, and the appointment of an investigator under the Criminal Justice Act of 1964, 18 U.S.C. 3006A(e)(1). In an affidavit submitted in support of the motion, one of petitioner's attorneys stated (C.A. App. 33a) that "preparation of this defense requires an immense amount of work, both on the law pertinent to the issues and the facts of the case." The attorney also asserted that an "authorized investigator, working with the defense * * * could travel, interview witnesses, review and locate other documents, and otherwise substantiate the defense position that no criminal fraud was committed by the defendant" (*id.* at 34a). In the same affidavit, however, counsel asserted (*id.* at 37a-38a) that petitioner should be permitted to travel abroad because "an investigator would be unable to secure some of the required information."

The district court denied the motion, concluding that "[d]efendant has not made an adequate showing of the

necessity for an investigator. The court has already approved the appointment of two trial counsel for the defendant pursuant to the Criminal Justice Act. There is no reason why the necessary trial preparation cannot be achieved by counsel" (C.A. App. 47a). The court also noted that four and a half months was ample time within which to prepare for trial and that petitioner had been abroad for a month in January gathering evidence for trial (*ibid.*).[1]

The court of appeals affirmed petitioner's conviction and rejected, *inter alia*, his claim that the district court should have appointed an investigator. The court stated (Pet. App. 2a; citations omitted): "In light of the defendant's failure to set forth the reasons for the need of an investigator's services and its relevance to an adequate defense, * * * and in the absence of a showing that his attorneys could not undertake the tasks to which the investigator was to be assigned, * * * Judge Metzner properly exercised his discretion in refusing to

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[1]Petitioner recently filed a motion in the district court for reduction of sentence under Fed. R. Crim. P. 35 supported by an affidavit by a New York attorney representing petitioner. The affidavit asserts, on the basis of what petitioner has now informed the affiant, that petitioner was not overseas gathering evidence during the month of January, 1978, but instead was overseas during that period on an unofficial diplomatic mission "relative to a highly secret matter that involved the national security of the United States" (Aff. 6). None of these allegations were before the district court when it ruled on petitioner's pretrial motions (or, as the affidavit admits (Aff. 10), before the court at sentencing). What was before the court were the repeated representations of Leonard that he had been in telephone communication with petitioner, that petitioner was overseas gathering evidence for his defense, and that petitioner was unaware, before he left, "of how many cartons of documents he would have to go through to gather the evidence to support his position" (January 23, 1978 Tr. 16).

appoint such an investigator under the Criminal Justice Act, 18 U.S.C. 3006A(e)(1) (citations omitted)."

ARGUMENT

Petitioner's sole claim is that the district court abused its discretion in failing to grant his motion for the appointment of an investigator under 18 U.S.C. 3006A(e)(1) (Pet 8-15). The court of appeals correctly rejected that claim.

18 U.S.C. 3006A(e)(1) authorizes courts to provide "investigative, expert, or other [non-legal] services" only when there is a showing that the services are "necessary for an adequate defense." The courts that have considered this statute have uniformly held that bare assertions of general need for the services of an investigator are insufficient to require the trial judge to grant the motion. See, *e.g.*, *United States* v. *Davis*, 582 F. 2d 947 (5th Cir. 1978); *United States* v. *Harris*, 542 F. 2d 1283 (7th Cir. 1976), cert. denied, 430 U.S. 934 (1977); *United States* v. *Kasto*, 584 F. 2d 268, 273 (8th Cir. 1978); *Mason* v. *Arizona*, 504 F. 2d 1345 (9th Cir. 1974), cert. denied, 420 U.S. 936 (1975); *United States* v. *Mundt*, 508 F. 2d 904, 908 (10th Cir. 1974), cert. denied, 421 U.S. 949 (1975). As the Fifth Circuit recently held, "[a] defendant must show specifically the reasons why the services are necessary." *United States* v. *Davis, supra*, 582 F. 2d at 951.

In this case, petitioner's request was supported only by the bare assertions of counsel that preparation of the defense required the services of an investigator "who could travel, interview witnesses, review and locate other documents, and otherwise substantiate the defense position that no criminal fraud was committed by the defendant" (C.A. App. 33a). However, the

motion and supporting affidavit failed to identify any such witnesses or documents and provided no reason why such activities could not be performed by one of the two attorneys appointed to represent petitioner. See *United States* v. *Harris*, *supra*, 542 F. 2d at 1315-1316. The statute does not require the district court to accept at face value such general and unsupported assertions of need, and it was thus well within the court's discretion to deny the motion on the grounds that counsel were capable of preparing adequately for trial, that four and a half months was sufficient time to locate documents and witnesses, and that petitioner himself had already been abroad for a month gathering evidence. In any event, the correctness of the trial judge's decision turns solely upon the application of settled principles to the particular facts of this case and does not warrant this Court's review.

Petitioner also errs in contending (Pet. 10-11) that the standard applied by the courts below conflicts with the standard established by other circuits. The cases cited by petitioner (Pet. 10-11), which all involved requests for the appointment of psychiatric experts, suggest that an expert should be appointed under Section 3006A(e)(1) "in circumstances in which a reasonable attorney would engage such services for a client having the independent financial means to pay for them." *United States* v. *Bass*, 477 F. 2d 723, 725 (9th Cir. 1973).[2] Even assuming that those courts would apply the same standard to requests for the appointment of an ordinary investigator (see *United States* v. *Harris*, *supra*, 542 U.S. at 1315), that

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[2]See also, *Brinkley* v. *United States*, 498 F. 2d 505 (8th Cir. 1974; *United States* v. *Theriault*, 440 F. 2d 713, 717 (5th Cir. 1971) (Wisdom, J., concurring), cert. denied, 411 U.S. 984 (1973).

standard is not inconsistent with the ruling of the courts below that a defendant must still make some particularized showing that the investigator or expert is necessary to prepare an adequate defense. Indeed, the cases cited by petitioner all relied on specific facts that demonstrated the need for the requested expert.[3] Furthermore, one would assume that a lawyer for a client who has the financial means to pay for investigative services would be able specifically to identify to the investigator the witnesses and matters he would like him to investigate and their relevance to the case, which the affidavit of applicant's counsel failed to do.[4] In sum, petitioner's showing in the district court would not have entitled him to the appointment of an investigator under Section

[3]Petitioner's suggestion that the decisions in *Bass* and *Theriault* indicate that the Ninth and Fifth Circuits would have reached a different result from that of the Second Circuit is also belied by the subsequent decisions in *Mason* and *Davis*. In cases where the defendant has made a specific showing of need for the services of an expert, the Second Circuit has granted relief and has cited *Theriault* and *Bass* with approval. See *United States* v. *Durant*, 545 F. 2d 823, 827 (2d Cir. 1976).

[4]Again, the district court is not required to accept the bare assertion of an applicant or his counsel that they would hire an investigator if they had the means to do so, and the cases cited by petitioner do not suggest otherwise. Nor do those cases suggest that a court is required to appoint an investigator to assist an indigent merely because a defendant with unlimited resources might hire an investigator (or a team of investigators) out of an abundance of caution. Cf. *Ross* v. *Moffitt*, 417 U.S. 600, 616 (1974). The Report of the Committee to Implement the Criminal Justice Act recommended that "the allowances of petitions for investigative services be strictly limited, to the extent possible, to those charges necessary in the strictest sense of the word." 36 F.R.D. 277, 290 (1965).

3006A(e)(1) under any of the standards petitioner suggests are followed in other circuits.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

BARRY A. FRIEDMAN
Attorney

MAY 1979

[5]Petitioner's further suggestion (Pet. 12) that the proceedings here were contrary to the provision of Section 3006A(e)(1) that requests for investigative services be heard *ex parte* is without merit. Petitioner's motion, with supporting affidavit, was served on the government, and the prosecutor replied with a memorandum in opposition. Petitioner did not then specify his need for an investigator or request an *ex parte* hearing in which he could specify such a need. Thus, the cases relied on by petitioner (*United States* v. *Sutton*, 464 F. 2d 552 (5th Cir. 1972); *Marshall* v. *United States*, 423 F. 2d 1315 (10th Cir. 1970), are inapposite. Both involve instances where the prosecutor remained in the courtroom when an *ex parte* hearing was being held, thus forcing the defendant to reveal his defense strategy to the government or lessen the chance of obtaining the services of an investigator. Here, of course, petitioner revealed his strategy, or lack thereof, by sending his motion and affidavit to the government.

DOJ-1979-05